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**UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

CARL MITCHELL, et al.,

PLAINTIFFS,

v.

CITY OF LOS ANGELES, et al.,

DEFENDANTS.

Case No.: 16-cv-01750 SJO (JPR)

PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: ISSUANCE OF A PRELIMINARY INJUNCTION

Date: None
Time: None

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# TABLE OF AUTHORITIES

**Federal Cases:**

**State Cases:**



**Federal Constitution and Statutes:**



**State Constitution and Statutes:**



**City Ordinances:**

## Table of Contents

# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

In *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012), the Ninth Circuit affirmed a preliminary injunction against the City of Los Angeles, barring the City from seizing and destroying homeless people's belongings.[1] The Court held that, because homeless people's unabandoned possessions are property within the meaning of the Fourteenth and Fourth Amendments, the City could not seize and destroy these items but, instead, had to comply with fundamental requirements of due process. *Id*. at 1027. *Lavan* made clear that Plaintiffs' property is lawfully on the public sidewalks pursuant to the *Jones* settlement, *id.* at 1024-25, and that a city must comply with constitutional requirements when it seizes and discards or destroys a person's possessions, even when they are on a public sidewalk. *Id.* at 1033. Now, however, the City has reinstituted a policy and practice of seizing and destroying the property of homeless people, in clear disregard of *Lavan* and the Constitution.

Since at least mid-December 2015, the City has been destroying the property of homeless people it arrests for minor quality of life offenses, which the City in 2014 determined should be charged as infractions and, as a result, cannot result in arrest. *Cite.* Because Defendants destroy nearly everything immediately, allowing no opportunity for a pre- or post-deprivation hearing, Plaintiffs have no opportunity to counter Defendants' assertions as to why the property should be destroyed. These actions leave Plaintiffs to live on the streets without their critical medications, tents, tarps, blankets and other personal property, a result that far outweighs any speculative public health argument made by the City to justify its actions. This is particularly critical when it rains or there is inclimate weather. On March 29, 2016, it hailed on Skid Row, and the nighttime temperature droped to___degrees.

[1] *Lavan* was only the latest in a series of court battles against the City for its treatment of homeless people. *See* Amended Complaint at ¶¶ 9-11.

In this application for a temporary restraining order, Plaintiffs seek only what *Lavan* directs: an order prohibiting Defendants from seizing and summarily destroying homeless people's property without probable cause and constitutionally adequate pre- and post-deprivation notice. *Id.* at 1033. Here, as in *Lavan*, "the City almost certainly could not ... argue that its summary destruction of [homeless individuals'] ... property was reasonable under the Fourth Amendment." *Id.* at 1031. The City may not avoid *Lavan*'s mandate by assertions that the property is in an illegal shopping cart or presents a public health concern without providing a process to challenge those assertions. Equity weighs heavily in favor of a Temporary Restraining Order to protect the property rights of Plaintiffs, who live on the streets, without shelter and without an accessible place to store their property.

## II. STATEMENT OF FACTS

The individual Plaintiffs in this litigation are all homeless individuals who stay on the streets of Skid Row. Declaration of Judy Coleman ("Coleman") ¶ 2; Declaration of Salvador Roque ("Roque") ¶ 2; Declaration of Carl Mitchell ("Mitchell") ¶ 2; Declaration of Michael Escobedo ("Escobedo") ¶ 2. Over the past three months, each of these individuals has lost nearly all of their belongings at the hands of the Los Angeles Police Department and the LA Sanitation crews that accompany the LAPD. Coleman, ¶¶ 9-10, 15, 19-20, 28-29; Roque, ¶¶ 15-16, 26-27, 29, 32, 34; Mitchell, ¶¶ 6, 10, 12, 13-14; Escobedo, ¶¶ 7, 12-14. They have had their belongings taken and destroyed while they were either in police custody, or standing by during a street cleaning. Coleman, ¶¶ 4, 6-9, 11-12; Declaration of Paul Brown ("Brown") ¶¶ 4, 8-10, 12-13; Declaration of Shelly Flood ("Flood") ¶¶ 4-5, 8, 10; Roque, ¶¶ 7-9, 11, 13, 15; Mitchell,¶¶ 3-7; Escobedo, ¶¶ 6-7. The few items that have been saved have been misplaced or made completely inaccessible. Coleman, ¶¶ 13, 25-33; Brown, ¶ 15; Roque Decl. ¶¶ 11, 14, 16-29, 32; Mitchell, ¶¶ 6-7, 11; Escobedo ¶¶ 8.

None of the plaintiffs were given any opportunity to challenge the destruction of their belongings, and despite the City's position that it stores individuals' belongings,

the City provides no fair or reliable process to get the few items that are preserved back from the City—storage facilities are frequently closed or inaccessible, items are lost, officers on the street do not know what the procedures are, and notices provide insufficient information. Coleman, ¶¶ 9, 11, 13, 25-33; Roque, ¶¶ 9, 11, 14, 16-29, 32; Mitchell, ¶¶ 5-7, 11; Escobedo, ¶¶ 7-8. Plaintiffs have had to go on endless searches, to numerous agencies, in an often futile attempt to locate their belongings. Coleman, ¶¶ 9, 11, 13, 25-33; Roque, ¶¶ 9, 11, 14, 16-29, 32; Mitchell, ¶¶ 5-7, 11.

As a result of these losses, the individual Plaintiffs and members of LA CAN, an organizational plaintiff in this litigation, have and continue to suffer significant consequences. Coleman, ¶¶ 10, 22-24, 34; Roque, ¶¶ 30-34; Mitchell, ¶¶ 12-14; Escobedo, ¶¶ 12-14; Richardson, ¶ 3, 4-22 The organizational plaintiffs have to exert significant resources because of these practices, and the individual plaintiffs and organizational members have suffered adverse health consequences, including illness, loss of sleep, depression, and exacerbation of existing mental health issues. Richardson, ¶ 3; Ares, ¶¶ 5, 9; Coleman, 22-24; Roque, ¶¶ 30-31, 33, 35; Escobedo, ¶ 13. Mr. Roque's depression has gotten worse. Roque, ¶¶2, 33, 35. Judy Coleman and her husband were hospitalized for pneumonia. Coleman, ¶¶ 18, 24; Brown, ¶¶ 14-15.

The Plaintiffs and members remain on the street and at risk of additional deprivation as a result of these practices, which remain ongoing, continuing even after this lawsuit was filed. Coleman, ¶ 2; Roque, ¶ 2; Mitchell, ¶ 2; Escobedo, ¶2; Richardson,¶¶ 4-22; Ares, ¶¶ 10, 15-18. On March 23, 2016, members of LA CAN's Community Watch witnessed LAPD and City employees seizing and destroying the property of two individuals who were arrested on Ceres Street near the LA CAN office. Richardson, ¶¶ 4-22. When one of the individuals, an LA CAN member, was released from custody, the LA CAN organizer went with him to get his belongings back; after many tries, the only items LAPD could locate that they had booked as his was a single brand new tarp and a religious statue. Richardson, ¶¶ 13-22.

## III. DEFENDANT CITY OF LOS ANGELES VIOLATED PLAINTIFFS' RIGHTS BY SEIZING AND DESTROYING THEIR PROPERTY

### a. Plaintiffs are likely to succeed on their claim that the challenged actions violate Plaintiffs' Fourth Amendment Rights

The Fourth Amendment "protects the right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches." U.S. Const., Amend. 4. A "seizure" under the Fourth Amendment occurs "where there is some meaningful interference with an individual's possessory interest in that property." *Soldal v. Cook County Ill*., 506 U.S. 56, 63 (1992). A seizure without a warrant is "*per se* unreasonable. The Government bears the burden of showing that a warrantless search or seizure falls within an exception to the Fourth Amendment's warrant requirement." *United States v. Cervantes*, 703 F.3d 1135, 1141 (9th Cir. 2012). And even if a search or seizure is lawful at its inception, the seizure "can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 124-25 (1984*). See also Lavan*, 693 F.3d at 1030.

There should be no legal dispute that homeless individuals have a property interest in their tents, blankets, tarps, medication, personal papers and other items, and that these enjoy constitutional protection. This issue has already been resolved, and in *Lavan*, both the District Court and the Ninth Circuit foreclosed any argument that homeless individuals do not have a protectable property interest in their belongings. *Lavan*, 693 F.3d at 1031; 797 F. Supp. 2d at 1101, 1016. Therefore, the only legal question for purposes of Plaintiffs' likelihood of success on their Fourth Amendment claims is whether the summary destruction of the majority of plaintiffs' property constitute unreasonable seizures. Existing case law and the circumstances surrounding the seizure and destruction compel a finding that Plaintiffs are likely to succeed on these claims.

First, the destruction of homeless people's property is undoubtedly a deprivation that triggers Fourth Amendment analysis, *see Jacobsen*, 466 U.S. at 124-25, and that deprivation—the wholesale destruction of most of plaintiffs' personal belongings—is patently unreasonable. *Lavan,* 693 F.3dd at 1030. In fact, in *Lavan*, the Ninth Circuit noted that the City "almost certainly could not" even argue that the summary destruction of homeless people's property under very similar circumstances was reasonable under the Fourth Amendment. *Id.*

When the destruction occurs today, the City knows that individuals own the property and that the property is not abandoned. In Mr. Escobedo's case, he was removing his property to allow for street cleaning, but was moving too slowly for the City and was not allowed to remove his tent. Escobedo, ¶¶ 7. It was needlessly destroyed. *Id*. Mr. Roque was arrested for a missing a court date on a citation he received for violating Los Angeles Municipal Code Section 41.18(d). All of his property was seized and nearly all of it was destroyed. Roque, ¶ 27; Ares ¶¶ 11-14, Exhs. 6, 14. At the same time, his neighbor Ernesto Aguirre's property was also taken and most of it destroyed, even though Mr. Aguirre returned and pleaded for the items to be preserved. *Id.* Ms. Coleman was arrested based on her proximity to someone else's purportedly illegal shopping cart, but despite her husband's presence with their shared property, her tent and other items were destroyed. Coleman, ¶¶ 6-8, Brown, ¶¶ 8-10. Mr. Mitchell and members of the Los Angeles Community Action Network also had their property seized and destroyed under similar circumstances. Mitchell, ¶¶ 4-5, 10-13; Declaration of Gabby Cervantes, ¶¶ 5-6; Richardson, ¶ 4-12.

The fact that, in many instances, the property was seized in conjunction with the arrest of its owner does not render the destruction of plaintiffs' property reasonable. If anything, the arrest of the individuals renders the destruction even more unreasonable because law enforcement officers know exactly who the owner is and how they can be located. While the arrest of a person may give the City the authority to conduct a warrantless *search* of Plaintiffs' belongings under limited

circumstances, the exception that allows for a search of the property does not justify the seizure and destruction of the property.[2] *See Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), overruled on other grounds by *Robinson v. Solano County*, 278 F.3d 1007 (2002); *Allen v. United States*, 964 F.Supp.2d 1239, 1257 (D. Nev. 2013).

To the extent the City justifies its actions by invoking the Community Caretaking doctrine, such a justification cannot be sustained. The Community Caretaking exception to the warrant requirement allows law enforcement to "impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic, . . . based on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft." *Miranda v. City of Cornelius*, 429 F.3d 858, 863 (9th Cir. 2005) citing *South Dakota v. Opperman,* 428 U.S. 364, 371 (1976). Even assuming that the doctrine would extend to personal property, *see Opperman,* 428 U.S. at 366 (holding that unique characteristics of vehicles render the Fourth Amendment analysis different), using this exception to justify how the City mishandles homeless people's belongings would do violence to a doctrine that is designed to protect the property at issue and is legal only if it is "conducted pursuant to standard police procedures that are aimed at protecting the owner's property and at protecting the police from the owner charging them with having stolen, lost or damaged his property." *Cervantes*, 703 F.3d at 1141.

In many instances, the property need not be seized in the first place. Judy Coleman's property could have been left with her husband, who was on the scene and who also owned the property that was taken. Mr. Escobedo was present and could have taken his tent had he been given a few moments more. The presence of others

[2] In fact, an individual's arrest does not give the City carte blanch permission to *search* all of the arrestees' belongings, let alone seize and destroy them. For purposes of this motion, Plaintiffs do not contest the validity of the search, only the propriety of the destruction of the property and subsequent storage of the remaining property in a way that makes it almost impossible for Plaintiffs to get their items back.

who can care for the property renders the seizure unreasonable and the destruction of property unconscionable. *See Miranda v. City of Cornelius*, 429 F.3d 858, 865 (9th Cir. 2001); *see also United States v. Duguay*, 93 F.3d 346, 352 (7th Cir.1996) (it is "patently unreasonable" to impound a vehicle when the owner can provide for its removal, "if the ostensible purpose for impoundment is for the 'caretaking' of the streets'"). But even in those instances in which the owner is arrested and there is no one nearby to care for the property, the Community Caretaking doctrine cannot be used to condone the *destruction* of the property, rather than the its storage for return when the individual is released from custody. This exception "must not be a ruse" to justify behavior that is otherwise not be allowed under the Fourth Amendment. *Cervantes*, 703 F.3d at 1141 (quoting *Florida v. Wells*, 495 U.S. 1, 4).

Nor can a concern for the general health and safety of the community justify the seizure and destruction of the property. In *Lavan* and its predecessors, the City argued that it needed to destroy property for public safety reasons. The District Court and the Ninth Circuit soundly rejected these arguments. *See Lavan*, 797 F. Supp. 2d at 1015 (noting that the seizure of property "threatens the already precarious existence of homelss individuals by posing health and safety hazards" and violated the Fourth Amendment, despite "an inherent interest in keeping public areas clean and prosperous"). The District Court's injunction in *Lavan,* which the Ninth Circuit upheld, allowed for the seizure of property based on an *immediate* threat to health and safety. *See id.* at 1020. However, the Court also recognized that the seizure of the personal belongings of a homeless individual had significant health and safety implications for the individual whose property was seized, and prohibited the kind of wholesale destruction at issue in this case as well. *Id.*

Finally, Defendants also use the opportunity to seize and destroy others' property when they are picking up the arrestees' belongings. The Fourth Amendment protection against unlawful search and seizure does not allow for the seizure of another's property based on the arrest of another. *See Ybarra v. Illinois*, 444 U.S. 85

(1979). "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person['s property]. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another[.]" *Id.* at 91.

**b. Plaintiffs Are Likely To Succeed On Their Claims That Defendants Violated Plaintiffs' Fourteenth Amendment Right to Due Process**

Under the Fourteenth Amendment, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV. To determine whether there has been a due process violation, the Court follows a two-step analysis: first, it determines whether there is a property interest encompassed within the protection of the due process clause, and if there is, what process is due. *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991). Whether there is a protected property interest requires the court to look to "'existing rules or understandings that stem from an independent source such as state-law rules or understandings." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

California "recognizes the right of ownership of personal property, a right that is held by '[a]ny person, whether citizen or alien.' California Civil Code §§ 655, 663, 771." *Lavan*, 693 F.3d at 1031. *See also* California Civil Code § 669 ("All property has an owner."). The foundation for this right is found in Article I, §7 of the California Constitution, which establishes the fundamental "guarantee that government may not deprive an individual of 'life, liberty, or property' without due process of law.'" *Traverso v. Dep't of Transp.*, 6 Cal.4th 1152, 1160, 864 P.2d 488 (1993) (noting with approval protected property interests "in personal possessions as 'undesirable' as junk cars") (citing *Propert*, 948 F.2d 1327, and *Price v. City of Junction, Tex.*, 711 F.2d 582 (5th Cir. 1983)).

Tents, tarps, blankets, medication, and other items are property protected by

the Fourteenth Amendment. *See Lavan*, 693 F.3d at 1032 (holding that the protections guaranteed by the Fourteenth Amendment attach "regardless of whether the property in question is an Excalade or an EDAR, a Cadillac or a cart."). In most instances, the volume of what is taken and destroyed constitutes almost everything the individual owns in the world. The value to the plaintiffs is great, and this is sufficient to establish a property interest.

The second question then is what process is due. "Procedural safeguards come in many forms, including, *inter alia*, 'timely and adequate notice,' pre-termination hearings, the opportunity to present written and oral arguments, and the ability to confront adverse witnesses." *Nozzi v. Housing Authority of City of Los Angeles*, 806, F.3d 1178, 1192 (9th Cir. 2015) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)). The amount of process that is due depends on a balance of factors outlined in *Mathews v. Eldridge*: "first, the private interest affected by the government action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 424 U.S. 319, 335. Defendant's policy and practice of destroying property without any process, and storing property without sufficient notice or procedures to ensure its return, ignore these clearly established legal standards.

**i. The wholesale destruction of property, without any method to challenge the destruction, violates the 14th Amendment**

The summary destruction of property, whether it occurs on a moment's notice, incident to arrest, or when the individual is unable to move it during a cleanup, suffers from the same Constitutional infirmity—it violates the owner's due process because it affords absolutely no process by which the owner of the property can challenge the destruction of their property before "the owner is finally deprived of a protected property interest." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433

(1982). This is anathema to the concept of due process. "However weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero - that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest." *Propert*, 948 F.2d at 1333 (citing *Logan*, 455 U.S. at 434; *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) ("our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests")).

Despite the "truism that some form of hearing is required before the owner is finally deprived of a protected property interest," *Logan*, 455 U.S. at 433, and very clear instruction to that effect from the Court in *Lavan* and the preceding cases, the City is yet again destroying property without any opportunity to challenge the basis for the destruction. In *Lavan*, despite the City's request, the Ninth Circuit, in no uncertain terms, declined to "create an exception to the requirements of due process for the belongings of homeless people." *Lavan*, 693 F.3d at 1033. Instead, the Court made it explicitly clear that "the City is required to provide procedural protections before permanently depriving Appellees of their possessions." *Id.* at 1032. *Lavan* is consistent with numerous other cases, in which the Court required due process to challenge the basis for destruction before the property was permanently destroyed. *See e.g., Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994) (holding that car owner was deprived of due process when his car was destroyed without proper notice or sufficient process, even after adequate notice and process regarding the initial seizure); *Wong v. City & County of Honolulu,* 333 F. Supp. 2d 942, 945 (D. Haw. 2004) (sweep of derelict vehicles that resulted in the destruction of motor vehicles violated due process). *See also Propert*, 948 F.2d at 1333 (compiling cases).

Rather than abide by that mandate, the City has once again enforced a policy and practice of destroying property without any opportunity to challenge the basis for the destruction. In each instance, the property was destroyed while Plaintiffs were

either pushed away from their property or taken away in the back of a police car.

As in *Lavan*, "the City's decision to forego any process before permanently depriving [homeless individuals] of protected property interests is especially troubling given the vulnerability of Skid Row's homeless residents." 693 F.3d at 1032. The items destroyed by the City include essentials needed to survive on the street, including tents, blankets, medication, and papers. The deprivation of these items for individuals who are homeless is significant, and the failure to provide any mechanism to challenge the permanent destruction and therefore, permanent deprivation of these items violates Plaintiffs' constitutional rights.

**ii. Plaintiffs are likely to prevail on their claim that the City's failure to provide adequate notice and a process to get a person's belonging back violates their right to due process**

Due process requires an individual both "be given notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Schneider*, 28 F.3d at 92. This process "must be tailored to the capacities and circumstances of those who" must rely on the process. *Goldberg,* 397 U.S. at 268-69. For the notice to satisfy due process, "[t]he notice must be of such nature as reasonably to convey the required information." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

The City also violates individuals' rights when it provides no meaningful notice or process to get back the few items it seizes and stores, let alone challenge the underlying seizure. The owners of property are frequently given no notice where they can pick up their property or even if property has been preserved. If they are given notice, the notice is inaccurate and does not outline the process actually required to get their property back. The process itself is convoluted and does not take into account any of the "capacities and circumstances" of the parties, as the City is required to do. *Goldberg*, 397 U.S. at 268-69. Taken together, the City policies are inadequate, given the serious deprivation to plaintiffs. *See Eldridge*, 424 U.S. at 341.

First, "the nature of the interest . . . and the degree of potential deprivation that

may be created," is significant. *Eldridge*, 424 U.S. at 341. Assuming, *arguendo*, that the City preserves some property, these few remaining items are frequently the last remaining belongings the person has. It is imperative that they get these items back quickly. As discussed below, remaining without them for even short periods of time may threaten their health and safety. *See Lavan*, 693 F.3d at 1032. *See also Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 17-18 (1974) (holding that a deprivation for even a short period of time can threaten health and safety constitutes a significant interest). Moreover, if, as here, the notice and process for getting the property back is flawed, the individual will be permanently deprived of these items, either because they are never actually able to find them, or because it simply takes too long: LAPD policy provides that the items be destroyed after 60 days if they are not claimed. Exh. 9. Therefore, the interest and the potential deprivation are significant.

The second Eldridge factor considers "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Eldridge*, 424 U.S. at 335. This factor requires the Court to weigh the "fairness and reliability of the existing procedures ." *Nozzi*, 806 F.3d at 1193. The City's procedures for getting property back after it taken is anything but fair and reliable.

First, notice about how to get one's property back is insufficient. "To be constitutionally adequate, notice must be reasonably calculated under all circumstances, to apprise interested parties with due regard for the practicalities and particularities of the case." *Nozzi*, 806 F.3d at 1194 (citing *Mullane*, 339 U.S. at 314) (internal quotations removed). The notice provided here fails this test. Some individuals are not given any notice of what happened to their property. Plaintiffs Sal Roque and Carl Mitchell were given only a "prisoner's receipt," which listed only their belts, shoelaces, and similar items that were on their person when each was

arrested.[3] Exh. 2, 7. Ms. Coleman received another notice when she was released, but this notice is also inadequate because "the means employed" do not "actually inform the party," of the steps required to obtain one's property. *Nozzi*, 806 F.3d at 1194. She was given a form entitled "Excess Personal Property Receipt", which stated that the warehouse at 140 Judge John Aiso, Los Angeles, CA 90012 is open for pickup of property on Tuesday-Friday, between 8:00 a.m. and 1:00 p.m.

Despite this seemingly clear instruction, this in no way reflects the reality for individuals whose property is taken. First, the facility on Judge John Aiso street is nothing more than a poorly marked large metal shed in the middle of a parking lot, and extremely difficult to find. Ares, ¶ 20, Exh. 17. If one does locate the facility, there is rarely someone staffing it during the extremely limited posted hours, despite the stated notice that the "warehouse is open." Unless an officer happens to be there, an individual who shows up at the warehouse will find a padlocked door and a sign stating that they must call the Central Station. *Id.* Many homeless individuals do not have working phones to make the call, and even if they do, these calls have repeatedly gone unanswered, or they are placed on hold—using up valuable batteries and cell phone minutes. *Id*. The sign at the location does not give the address of the Central Division or provide any alternatives to get their belongings. *Id.*

If one knows where the main Central police station is located, they can try going there for help, but the distance from Judge John Aiso is far. For Ms. Coleman and others with mobility issues and inadequate or no transportation, this distance is prohibitive, particularly if it takes multiple trips as it often does. And officers there frequently have inaccurate or incomplete information. Ares, ¶ 14.

Even if one finally gets access to the Judge John Aiso storage facility, there is

[3] Exh. 9. The receipt states: "YOUR PROPERTY: Your property will be returned to you immediately upon your release from LAPD custody." No other notice was given about how to get back their other belongings.

no guarantee that the property is there. Mr. Roque attempted numerous times to get his property back. He went to the main jail, Central Station, and Judge John Aiso multiple times and was told his property was not there. Roque, ¶¶ 16-22, 25-26. The few items that were saved were made available to him only after this action was filed. *Id.* On March 25, 2016, an LA CAN organizer went to the Judge John Aiso facility with a member whose property was taken the day before, but the property was not there. Only after significant pressure from the organizer did the LAPD officer locate the property at another facility which is not disclosed to the public. Some, like Mr. Mitchell, never get any of their property back. If someone finally overcomes the maze of agencies and locations and finds his property, he is required to sign a form stating that it has been returned and has no way to contest the deprivation if not all of the property is returned. Coleman, ¶ 13; Roque, ¶¶ 28-29.

These failures in notice and process render the deprivation of property, whether temporarily or permanently, unconstitutional. See *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) (holding that a utility company violated Plaintiffs' due process rights after Plaintiffs made "good faith efforts" to "straighten out the problem," but were never notified of a process to resolve the issue and, despite their efforts, their service was wrongfully terminated). This is particularly true for homeless individuals who find their belongings taken when they are arrested. While this lack of notice and process would be frustrating for a person with stable shelter and resources like a cell phone or transportation, homeless individuals on Skid Row rarely have access to transportation or a charged cell phone, and frequently have mobility or cognitive disabilities that make navigating the twists and turns required to get access to the few belongings virtually impossible. *See supra* page 8 and n. 6, 14. The failure to "take account for the 'capacities and circumstances'" of the individuals who must traverse this system renders an already unfair system unconstitutional. *Nozzi*, 806 F.3d at 1194 (quoting *Goldberg*, 397 U.S. at 268-69; *Memphis Light,* 436 U.S. at 14, n. 15).

Finally, the third *Eldridge* factor also weighs in favor of a due process violation. The burden of providing adequate process, including immediate access to property and notice that effectly spells out the processs to get the property back, would be minimal, since the City has more than enough resources to return property to individuals released from custody, particularly when balancing their rights and the interests at stake. *See Prophet*, 948 F.2d at 1335.

**c. Plaintiffs Are Likely To Succeed On Their Claim That The Challenged Actions Violate Their Fourteenth Amendment Substantive Due Process Rights**

State-created danger liability is borne out of "a citizen's liberty interest in her own bodily security." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). A deprivation that is sufficiently serious constitutes a substantive due process violation. *Wood v. Ostrander*, 879 F.3d 583, 589 (9th Cir. 1989).

When the actions of government employees place individuals in a known and obvious danger, the state is responsible for the harms caused by their actions. *Henry A. V. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012). Liability results from "creating or exposing individuals to danger they otherwise would not have faced." *Kennedy*, 439 F.3d at 1062. It is sufficient if the agents "expose[d] the plaintiff to a danger that already existed." *Willden*, 678 F.3d at 1002-03; *see also Kennedy*, 439 F.3d at 1062 n.2. There are three factors to this claim: 1) whether affirmative action of public employees placed the individual in danger he would not otherwise have faced; 2) whether the danger was known or obvious; and 3) whether the officer acted with deliberate indifference to that danger. *Id*. "Deliberate indifference" exists when the officer "disregards a substantial risk of serious harm of which he is aware." *L.W. v Grubbs*, 92 F.3d 894, 899 (9th Cir. 1996). The danger must be "known [by the official] or so obvious as to imply knowledge." *Id*. at 900.

When Defendants seize and destroy, or make inaccessible, the property of homeless individuals, they affirmatively place individuals in the following danger: 1)

homeless individuals are left to sleep on the sidewalks without any protection from the elements; and 2) when plaintiffs' medication and medically-necessary equipment is seized and destroyed or made inaccessible, they have no access to the life-sustaining treatment they need to survive. *Wood* establishes the elements of a Fourteenth Amendment claim of "obvious danger." 879 F.2d at 590. In *Wood*, officers left a female passenger on the side of the road in a high crime area in the middle of the night after arresting her companion for a DUI. She was later raped as she tried to find her way home. *Id*. at 586. Citing statistics and local crime reports, the Court noted that it was practically "undisputed" that the trooper, as an officer assigned to the area, knew the danger Ms. Wood faced. *Id*. at 590. It was "common sense" that the officer's actions put the plaintiff in danger. *Id*.

It is equally true that "common sense" dictates that Defendants' actions here put Plaintiffs in danger. According to The 2015 Annual Homeless Assessment Report (AHAR) to Congress, 89 percent of chronically homeless persons in Los Angeles are unsheltered.[4] Between 2014 and 2015, Los Angeles reported a 55 percent increase in the number of chronically homeless individuals.[5] The Los Angeles Homeless Services Authority (LAHSA) estimates that 31 percent of unsheltered homeless individuals are severely mentally ill, an equal number have some other medical disability and 24 percent are physically disabled.[6] Defendants are well aware of the challenges faced by persons who are homeless and living on the sidewalks at night. In fact, City officials explicitly noted these dangers in recent motions before the City Council.[7]

Liability based on state-created danger applies where the acts of officers

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[4] Exhibit 11, p. 67.

[5] *Id.* (4409 more chronically homeless individuals).

[6] *See* https://lahsa.org/homeless-count/demographics

[7] *See* Exhibits 12 (Motion re State of Emergency, 9/22/15) and 13 (Motion 9/22/15 ("Homelessness crisis is a moral, humanitarian and public health crisis …").

expose someone to dangerous weather. *Munger v. City of Glasgow Police Department,* 227 F.3d 1082 (9th Cir. 2000). There, the Court held the City liable for a state-created danger where officers removed an intoxicated person from a bar and then left him in extreme cold weather. *Id.* at 1086-87, citing *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) (leaving intoxicated person in cold weather constituted a state-created danger).

It is common knowledge that warmth and shelter from the elements are essential to avoid hypothermia.[8] Hypothermia can occur well above freezing temperatures, especially if a person becomes chilled from rain,[9] and such conditions are both common in Downtown Los Angeles in winter months[10], and predicted to occur over the next two months as the threat of El Nino remains.

The known risk of leaving people without adequate blankets in inclimate weather was underscored in *Wilson v. Seiter,* 501 U.S. 294, 304 (1991), finding a constitutional violation where a "low ... temperature at night combined with a failure to [provide[ blankets" produced a "mutually enforcing effect," demonstrating the loss of warmth, an identifiable human need. *Id.* In *Palmer v. Johnson*, 193 F.3d 346, 353 (10th Cir. 1996), a constitutional violation was found where inmates were forced to sleep outside without blankets, extra clothing or shelter in temperatures below 59 degrees: a denial "of the minimal civilized measure of life's necessities." *Id.*

Defendants' actions similarly evince a denial of "the minimal civilized measure of life's necessities." Plaintiffs are left to fend for themselves in weather that is frequently colder than the 59 degrees in *Palmer*. The temperature in downtown Los Angeles the night Mr. Mitchell was released was 40 degrees, not accounting for wind-chill. Ex. 5b. He had only a blanket he found on the street.

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[8] *See, e.g.*, Mayo Clinic, Prevention of Hypothermia (http://www.mayoclinic.org/diseases-conditions/hypothermia/basics/prevention/con-20020453) (June 18, 2014).

[9] Exhibit 4 (Center for Disease Control: "Hypothermia" (updated Dec. 2012))

[10] Exhibit 5 a-d (NOAA weather reports for November 2015 – March 2016

Mitchell, ¶ 12. When Mr. Escobedo's tent was seized and destroyed, he slept in the rain and cold for weeks, unable to protect himself with a small tarp. Escobedo, ¶ 12. Ms. Coleman became ill without her medical prescriptions and supplies, requiring hospitalization. Coleman, ¶¶ 18, 22-24. Similarly, "common sense" dictates that throwing away Plaintiffs' medications and diagnostic devices would result in illness, given the difficulty that many homeless individuals have in obtaining medical care in the first place, to say nothing of the challenges to replace items that have been destroyed. "For even the most routine medical treatment, the state of being homeless makes the provision of care extraordinarily difficult." *Id.*[11]

## IV. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

The standard for a temporary restraining order is the same as for a preliminary injunction. *Stuhlbarg International Sales Co. v. John D. Brush Co*., 240 F.3d 852, 839 n.7 (9th Cir. 2001). "A Plaintiff must show that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 759 (9th Cir. 2014) (citing, *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 20 (2008). Plaintiffs need show only that they are "likely" to prevail. At a minimum, they must show "serious questions going to the merits[,]" that the "balance of hardships tips sharply in [their] favor, and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)(internal quotation marks omitted). All four factors are met.

### a. Plaintiffs Have Shown A Likelihood of Success on the Merits

[11] As noted above, supra note 6, approximately 50 percent of unsheltered homeless persons have one or more serious mental or medical illness. *See* https://lahsa.org/homeless-count/demographics. In a landmark study published in 1988 by the National Academy of Science, 41 percent of unsheltered patients suffered from chronic diseases and compound disabilities.

For the reasons set forth above, Plaintiffs have shown a likelihood of prevailing on each of their claims.

**b. Plaintiffs Have Shown Irreparable Harm Absent Preliminary Relief**

Absent the Court's intervention, Plaintiffs will suffer irreparable harm from the City's policies and practices because they violate their constitutional rights. "An alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (internal citation omitted). "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. Nat'l Aeronautics & Space Admin*., 530 F.3d 865, 882 (9th Cir. 2008), rev'd on other grounds and remanded, 562 U.S. 134 (2011). No countervailing interest of the City outweighs the dire impact on Plaintiffs, who are homeless, live on the sidewalks pursuant to *Jones*, and suffer from multiple disabilities. The loss of essential possessions is "devastating" and clearly constitutes irreparable harm. *Lavan*, 693 F.3d at 1032 (internal citations omitted); *Lavan*, 79 F.Supp. 2d at 1019.

**c. The Balance of Equities Tips Sharply in Plaintiffs' Favor**

Where Plaintiffs show the likelihood of success on the merits and irreparable harm, "the balance of equities and public interest tip in favor of Plaintiffs." *Los Padres Forestwatch v. U.S. Forest Service*, 776 F. Supp. 2d 1042, 1052 (N.D. Cal. 2011). The balance weighs the potential harm to each side: the more permanent Plaintiffs' harm if relief is denied and the more temporary Defendant's harm if it is not, the greater the balance tips toward Plaintiffs. *League of Wilderness Defenders*, 752 F.3d at 765. The Court has balanced the harm here. "The City's interest in clean streets is outweighed by Plaintiffs' interest in maintaining the few necessary personal belongings they might have." *Lavan*, 797 F. Supp. 2d at 1019-20. Also, "the protection of constitutional rights is a strong equitable argument in favor of issuing the injunction." *Id*.

**d. A Temporary Restraining Order Is in the Public Interest**

The fourth element considers how an injunction will impact non-parties. *League of Wilderness Defenders*, 752 F.3d at 766. This prong, too, is in Plaintiffs' favor since "[i]t is always in the public's interest to enjoin actions that violate an individual's constitutional rights, all the more so when this is being done in the name of their own government." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

**e. A Temporary Restraining Order Should Apply to All of Downtown**

An injunction may extend beyond the named plaintiffs if it "is necessary to give prevailing parties the relief to which they are entitled." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501B02 (9th Cir. 1996) (internal citation and emphasis omitted). Defendants seize and discard property of others in the vicinity of a targeted individuals' property, even after being advised that the seized property belongs to another, the injunction must extend to all of Skid Row. *Lavan*, 693 F.3d at 1026, 1033 (injunction applies to "all unabandoned property on Skid Row" because "it would likely be impossible for the City to determine whose property is being confiscated").

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Respectfully submitted,
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